No. 758

JAN 19 1946

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945.

CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of TODD ERIE BASIN DRY DOCKS, INC., and on behalf of himself and other employees of TODD SHIPYARDS CORPORATION, similarly situated,

Petitioner,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

HERBERT GOLDMARK,
JOSEPH K. GUERIN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of TODD ERIE BASIN DRY DOCKS, INC., and on behalf of himself and other employees of TODD SHIPYARDS CORPORATION, similarly situated,

Petitioner,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Clarence A. Timony, suing on behalf of himself and as agent on behalf of other former employees of Todd Erie Basin Dry Docks, Inc. and on behalf of himself and other employees and former employees of Todd Shipyards Corporation, similarly situated, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on the 31st day of October, 1945, affirming the judgment of the District Court of the United States for the Southern District of New York entered March 7th, 1945, which dismissed the amended complaint herein.

Summary Statement of the Matter Involved.

The amended complaint was dismissed on motion by Judge Alfred C. Coxe, District Judge, for lack of jurisdiction (Opinion, R. pp. 50-55). The Circuit Court of Appeals affirmed the judgment of dismissal upon said opinion of the District Judge (R. p. 63).

The amended complaint contains three causes of action. In the first cause of action it is alleged that the respondent and its predecessor, Todd Erie Basin Dry Docks, Inc. were engaged in the production, repairing and converting of ships used in interstate commerce (R. p. 5) and that the petitioner and the other employees on whose behalf he is suing, were guards, whose occupation was necessary for the production of such ships in interstate commerce (pp. 5 and 6).

It is then alleged that on or about January 16th, 1942, an agreement was made between Todd Erie Basin Dry Docks Inc. and the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 39, as the sole and exclusive collective bargaining agency of certain of the employees of said Todd Erie Basin Dry Docks Inc., including the plaintiff and said other employees, whereby it was agreed, among other things, that, if said employees employed by said Todd Erie Basin Dry Docks Inc., or by any successor thereof, were required to work continuously more than five hours without an opportunity for lunch or supper, as the case might be, such employees should be entitled to receive a premium for all time worked beyond such five hours at the rate of one-half of the regular straight time base rate of pay of such employees until said employees had an opportunity for lunch or supper, at which time such right to such premium should end (R. p. 9).

The petitioner's base rate of pay is then stated and it is alleged that on the days set forth in Exhibit A, annexed to said amended complaint, he was required to work con-

tinuously for more than five hours without an opportunity for lunch or supper, by virtue of which he became entitled to recover the sum of $807.30 (R. p. 10).

Petitioner then alleged that he is suing on behalf of the 220 other employees, whose names are contained in Exhibit B, annexed to said amended complaint, who also worked continuously more than five hours on various days without an opportunity for lunch or supper and that the amounts that they are entitled to recover would be proved at the trial (R. pp. 10 and 11).

In the second cause of action the paragraphs "First" to "Twelfth", inclusive, of the first cause of action are incorporated by reference and it is then alleged that the agreement referred to in the first cause of action was made, in pursuance of the Fair Labor Standards Act of 1938, which became a part of said agreement, in that a requirement that employees should work for more than five hours continuously without an opportunity for lunch or supper was in violation of the purpose of said Act (R. p. 12); that the employment of petitioner and said other employees, as alleged in the first cause of action, without such opportunity for lunch or supper, was a violation of said Act (R. p. 13) and, therefore, petitioner was entitled to recover not only said sum of $807.30, but a like amount as liquidated damages under said Act, together with a reasonable attorney's fee, in pursuance of Section 16 (b) of said Act (R. pp. 13 and 14).

The third cause of action alleges a violation of the Labor Law of the State of New York by the respondent and its predecessor in failing to furnish petitioner and said other employees with such opportunity for lunch or supper midway between the beginning and end of his employment.

No diversity of citizenship is alleged in the amended complaint and petitioner conceded in the District Court and in the Circuit Court of Appeals that the second cause

of action alleging a violation of the Fair Labor Standards Act, furnished the only basis for jurisdiction by the District Court.

Judge Coxe in his opinion held that the amended complaint did not charge a violation of the Fair Labor Standards Act, because the allegations that the petitioner was required to work over five hours without an opportunity for supper, do not state a claim "for unpaid minimum wages or unpaid overtime compensation under Section 16 (b) of the Fair Labor Standards Act" (p. 55).

Petitioner further contended in the Courts below that even if the Court found that there had been no violation of the Fair Labor Standards Act, the Court should, nevertheless, retain jurisdiction to determine the first and third causes of action under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238. The District Judge held that, as the allegations charging a violation of the Fair Labor Standards Act were "plainly wanting in substance" there was no possible basis for invoking the doctrine of that case (p. 55).

Respondent also moved to dismiss the amended complaint on the ground that the labor agreement referred to in the amended complaint contained a provision for arbitration of the claims asserted by the petitioner, that an arbitration thereof was in fact had, pursuant to the agreement and that an award was made determining the claims in favor of the respondent (R. pp. 21, 23 and 54).

The Court in its opinion recited such provision for arbitration and that such an award had been made (R. p. 54). It did not however, base its dismissal of the amended complaint on this ground, but solely on the ground that no cause of action had been stated for violation of said Fair Labor Standards Act.

Nevertheless, as respondent may refer to such arbitration, as justification for the dismissal of the amended complaint, we shall contend herein that the question

whether such act was violated could not be made the subject matter of a valid arbitration.

Jurisdiction.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Questions Presented.

1. Whether the District Court did not err in holding that the failure to furnish petitioner with a lunch or supper period after five hours of continuous work did not violate the Fair Labor Standards Act.

2. Whether there could be a valid arbitration under the U. S. Arbitration Act, 9 U. S. C. A. Sec. 2, of the question whether such failure to furnish a lunch or supper period constituted a violation of said Fair Labor Standards Act.

Reasons Relied on for Allowance of the Writ.

The Writ should be granted for the following reasons:

1. It is of importance in the administration of the Fair Labor Standards Act, to have a determination by this Court, as to whether it covers only claims for unpaid minimum wages or unpaid overtime compensation, considered without reference to any other facts arising in connection with the performance of the work for which such compensation is earned.

This is a sufficient ground for granting the writ.

Roberts v. *U. S.*, 320 U. S. 264, 265;
S. E. C. v. *Joiner Corp.*, 320 U. S. 344, 345;

Commissioner v. *Gooch Co.*, 320 U. S. 418, 419;
Falbo v. *U. S.*, 320 U. S. 549, 551;
Tennessee Coal, Iron & Railroad Co. v. *Muscoda Local*, 321 U. S. 590.

2. It is important to determine whether the Fair Labor Standards Act does not by its very title and the humanitarian purpose for which it was enacted, condemn conduct obviously unfair on the part of an employer in failing to furnish employees with an opportunity for lunch or supper, without paying them for such deprivation.

3. It is important for this Court to determine whether in reaching a decision on this subject, it should take into consideration a universal custom, in harmony with the purposes of said Act, to grant a lunch or supper period to employees between the beginning and end of their daily work.

4. Because there is a conflict between the decisions of the 6th Circuit Court of Appeals in *Donahue* v. *Susquehanna Collieries Co.*, 138 F. (2d) 3 and the 6th Circuit Court of Appeals in *Gatliff Coal Co.* v. *Cox*, 142 F. (2d) 876, 882, as to the arbitrability under the U. S. Arbitration Act (9 U. S. C. A. Sec. 2) of the question whether the Fair Labor Standards Act has been violated.

It is important for this Court to determine the general question involved, which is constantly arising, whether a provision in a contract between an employer and employees, engaged in interstate commerce, to arbitrate future disputes arising out of such contract, is enforceable.

HERBERT GOLDMARK,
JOSEPH K. GUERIN,
Counsel for Petitioner.

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Petitioner,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The Maximum Hours Provision in Section 7 of the Fair Labor Standards Act presupposes that work will not be exacted for the maximum eight hours a day or forty hours a week, upon which the employee's straight time base rate of pay is calculated, without the customary time off for lunch or supper, unless a premium is paid for such overtime.

It is respectfully submitted that the Courts below erred in considering the maximum hours provision of Section 7 of the Act and the overtime compensation provided for

in Section 16 (b) of said Act, apart from the universal custom of granting to an employee during such maximum hours of employment an opportunity for lunch or supper.

Such provision, we submit, must be considered in connection with the customs surrounding the performance of the work to which such maximum hours are applicable.

It has frequently been held by this Court that it will take judicial cognizance of all matters of general knowledge.

Brown v. *Piper*, 91 U. S. 37, 42;
Muller v. *Oregon*, 208 U. S. 412;
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.

It is a general custom for employees to have a meal time.

Bryan v. *Burns*, 208 N. Y. App. Div. 389.

This Court has recognized the custom of allowing employees an ample period for meals.

Skidmore v. *Swift & Co.*, 323 U. S. 134

this Court said at page 138:

> "The Administrator thinks the problems presented by inactive duty require a flexible solution rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours

> of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. Exclusion of all such hours the Administrator thinks may be justified * * *. The facts of this case do not fall within any of the specific examples given but the conclusion of the Administrator, as expressed in the brief *amicus curiae* is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all others on-call time. Although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time'' etc.

The emphasis by this Court on the fact that the employees had a normal and ample eating time, gives judicial sanction to the requirement that the employees should have such normal and ample eating time.

This Court should, therefore, hold that in interpreting such maximum hour and overtime compensation provisions of the Act, such custom of giving employees an ample meal time should be recognized and that a failure to observe it, should be deemed a violation of the Act entitling the employees to extra compensation for the period during which they were deprived of a meal.

POINT II.

It is a violation of the humanitarian purposes of the Act to deny an employee an opportunity for lunch or supper without paying him a premium.

If the question whether a failure to furnish an employee with an opportunity for lunch or supper is considered apart from the maximum hours and overtime compensation provisions of the Act, the conclusion should be reached, that it is a violation of the humanitarian purposes of the Act, to deny an employee such opportunity.

In construing an Act of Congress it is proper to consider the legislative purpose in passing such act.

Williams v. *Terminal Co.*, 315 U. S. 386.

In order to determine such purpose reference may be had to the preamble of the statute and the declaration of policy therein stated.

Price v. *Forrest*, 173 U. S. 410;
U. S. v. *Darby*, 312 U. S. 100, 109;
Fleming v. *Warshawsky*, 123 F. (2d) 622 (CCA 7th).

The preamble of the Act is contained in Section 202, 29 U. S. C. A. and reads as follows:

> "The Congress hereby finds the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce

to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of Section 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

This preamble indicates that the purpose of Congress in enacting the statute was to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well-being of workers.

Furthermore, the purpose of the Fair Labor Standards Act appears from the following statement in Vol. 81, page 7648 of the Congressional Record by Justice Black of this Court who, as Senator Black, was the sponsor of the bill in the Senate:

"The bill is built upon the principle that we cannot depend, if I may paraphrase the expression which appeared in the Democratic platform of 1936, upon the diverse laws of 48 different States, enacted by the legislatures of all those States, and approved by the Governors of all those States. We cannot, if we are to obtain any action fail to recognize the fact, as was stated in that platform, the

> establishment of minimum wages and the regulation of working hours, insofar as they relate to goods shipped in interstate commerce, are matters for legislation by the Federal Government."

If the regulation of working hours to safeguard the health, efficiency and general well-being of workers was one of the objects of the bill, then a requirement that employees should be given an opportunity for lunch or supper comes within the purview of such a regulation, because the Court, we submit, should take judicial notice of the fact that the health, efficiency and well-being of employees will be adversely affected, if they are denied an opportunity for lunch or supper after five hours of continuous work.

Again, in ascertaining the legislative purpose, it is also relevant to examine the title of the act.

> *U. S.* v. *Katz*, 271 U. S. 354 and cases cited;
> *Baxter* v. *McGee*, 82 F. (2d) 702 (CCA 8th);
> *People* v. *Realmato*, 294 N. Y. 45, 49.

Congress in Section 1 of the Act stated that the title of the statute should be "Fair Labor Standards Act of 1938".

If Congress had intended that the Act should deal only "with unpaid minimum wages or unpaid overtime compensation" as held by Judge Coxe and by the Circuit Court of Appeals, the proper title to express such limited subject matter should have been "minimum wages and maximum hours" Act. Under this interpretation of the coverage of the Act there can be no question that it is not a "fair labor standard" to require employees to work continuously for more than five hours without an opportunity for lunch or supper unless a premium is paid. In fact, such a deprivation shocks one's sense of social justice.

This Court in construing the Act has taken into consideration the dangers and discomforts to the limb and health of the men.

> *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590.

In that case, in order to determine whether underground travel to and from the working face of the mine by employees should be deemed working time, this Court examined evidence showing that such trips were dangerous and detrimental to the health of the men, and, therefore, that the time spent in such trips should be counted as working time. If it had not been for the humanitarian purpose of the Act this Court might well have held, in accordance with custom and the contract between the parties, as well as on account of the commonly accepted meaning of the word "work", that the employees were not working when they were traveling to and from the place where they actually performed the duties for which they were employed.

Other courts have likewise held that the Act, being remedial, must not be interpreted in a narrow or grudging manner.

> *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (CCA 8th);
> *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 16, (CCA 1st);
> *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (CCA 7th).

POINT III.

In any event, evidence should have been taken as to whether a failure to have a meal period after five hours of continuous work, had a detrimental effect on the health of the employees.

It has been held that a complaint under the Fair Labor Standards Act ought not be dismissed for insufficiency of statement, unless it appears to a certainty that, under any state of facts which may be proved in support of the asserted claim, no basic right of action can possibly exist or no relief can possibly be granted.

Stratton v. *Farmers Produce Co. Inc.*, 134 F. (2d) 825 (CCA 8th);
Davila v. *Porto Rico Light & Power Co.*, 143 F. (2d) 236 (CCA 1st);
Castaing v. *Puerto Rican American Sugar Refinery Inc.*, 145 F. (2d) 403, (CCA 1st).

If this Court will not take judicial cognizance of the fact that failure to obtain an opportunity for lunch or supper will affect the health of employees, petitioner should have been given an opportunity to adduce evidence on this point.

Thus in

Muller v. *Oregon*, 208 U. S. 412

the Court accepted statistical evidence, in order to determine whether long hours of labor had a detrimental effect on the health of women, so as to bring a statute limiting such hours within the police power of the State of Oregon.

And in

Tennessee Coal, Iron & Railroad Co. v. *Muscoda* (*supra*)

the complaint was not summarily dismissed, but evidence was heard as to the dangers and discomfort to employees involved in traveling to and from the face of the mine.

In

Armour & Co. v. *Wantock*, 323 U. S. 126;
Skidmore v. *Swift & Co.*, 323 U. S. 134

evidence was taken to determine whether stand-by time was working time under the Fair Labor Standards Act.

It follows that the complaint herein should not have been summarily dismissed, but petitioner should have been afforded an opportunity to show the bad effect on the health of employees of their failure to obtain a meal period.

POINT IV.

As the Fair Labor Standards Act does not expressly provide a remedy for the violation complained of, the contract furnishes the measure of damages.

The Fair Labor Standards Act provides for the payment of time and one-half for each hour worked by an employee in excess of forty hours. There is, however, no specific measure of payment set forth in said Act, for any other violation thereof relating to the hours and pay of an employee.

Under these circumstances we have the right to use the measure of damages set forth in the agreement for the failure of respondent to furnish a lunch or supper period,

namely time and a half for each hour worked in excess of five continuous hours without such lunch or supper period.

It has been held that where a positive duty is imposed by statute, a breach of such duty will give rise to a cause of action, and, if the statute does not provide a remedy, the common law or the court will furnish it.

Wiley v. *Mulledy*, 78 N. Y. 310;
Racine v. *Morris*, 201 N. Y. 240;
Amberg v. *Kinley*, 214 N. Y. 531, 535;
Chotapeg, Inc. v. *Bullowa*, 291 N. Y. 70, 73, 74.

The measure of damages provided for in the contract is exactly the same as that laid down by the Fair Labor Standards Act for a violation of its provisions, with reference to hours of work and pay, and being in keeping with such Act, should be applied by the Court.

POINT V.

Whether respondent violated the Fair Labor Standards Act could not be a subject of arbitration.

Although the District Court in its opinion referred to the fact that the labor agreement contained a provision for arbitration, that an arbitration of the question involved herein had accordingly been had and a decision rendered in favor of the respondent, the Court did not pass upon the validity of such arbitration, because it found that no cause of action had been stated for violation of the Fair Labor Standards Act.

However, if this Court should hold that the complaint states such a cause of action, it might become material to consider whether the arbitration award in favor of respondent is a bar to the maintenance of this action. Therefore, we shall discuss this point.

It has been held that the ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts.

Walling v. *LaBelle S.S. Co.*, 148 F. (2d) 198 (CCA 6th).

Furthermore, it has been specifically held that a dispute arising under an employment contract between an employer and employees engaged in interstate commerce is not subject to arbitration under Sections 1 and 2 of U. S. Arbitration Act 9 U. S. C. A.

Gatliff Coal Co. v. *Cox*, 142 F. (2d) 876, 882 (CCA 6th).

Such U. S. Arbitration Act is applicable to the controversy herein for two reasons, first, because Article XXV of the labor agreement provides, that if either party shall fail to appoint an arbitrator within one week, the Senior Judge of the Circuit Court of Appeals for the Second Circuit shall make such appointment. For this reason it was the intention of the parties that the federal court should have jurisdiction over the labor agreement, and secondly, because the action has been brought in a federal court.

Parry v. *Bache*, 125 F. (2d) 493 (CCA 5th).

In the absence of an arbitration statute, a future dispute arising from a contract, would not be arbitrable at all.

Murray Oil Products Co. v. *Mitsui & Co. Lim.*, 146 F. (2d) 381, 383 (CCA 2d);

National Contracting Co. v. *Hudson River Water Power Co.*, 192 N. Y. 209;

Meacham v. *Jamestown F. & C. R.R. Co.*, 211 N. Y. 346;

Latter v. *Holsum Bread Company*, 160 Pac. (2d) 421, Sup. Ct. of Utah (June 1945).

There is, however, a difference of opinion, between the 6th Circuit Court of Appeals and the 3rd Circuit Court of Appeals, as to whether a dispute under the Fair Labor Standards Act can be made the subject of arbitration.

In

Donahue v. *Susquehanna Collieries Co.*, 138 F. (2d) 3 (CCA 3rd)

said Court, without considering the U. S. Arbitration Act, held that there was no reason why such a dispute was not arbitrable.

As pointed out above, the 6th Circuit Court of Appeals in *Gatliff Coal Co.* v. *Cox*, 142 F. (2d) 876, *supra*, disagreed with this view, because the U. S. Arbitration Act in Section 1, provides "that nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

The Circuit Court of Appeals in the *Gatliff Coal Co.* case in holding that a future dispute arising under a contract to which the Fair Labor Standards Act applies, cannot be arbitrated, makes the following comment at page 882 upon the decision of the 3rd Circuit Court of Appeals in *Donahue* v. *Susquehanna Collieries Co.*, *supra*, in referring to the U. S. Arbitration Act:

> "While the title to the Act and Sections 1 and 3 are set out in full in a footnote to the opinion, the Court nowhere in its opinion refers to the statutory exception. The point that the Arbitration Act excluded employment contracts must not have been called to the attention of the Court. In any event, if there be implied in the Court's decision a conclusion that the Arbitration Act is applicable to the

employment contracts, we find ourselves in disagreement."

This sharp divergence of opinion by these two Circuit Courts of Appeals, as to whether disputes arising under contracts to which the Fair Labor Standards Act applies, may be made the subject of a valid arbitration under the United States Arbitration Act should, we submit, be resolved by this Court.

It has been held that if the question submitted to arbitration was not an arbitrable one, the award is void, even though the parties submitted to the arbitration.

Matter of Benedict, 265 App. Div. 518;
Wiles v. *Peck*, 26 N. Y. 42;
J. F. Fitzgerald Construction Co. v. *Southbridge Water Supply Co.*, 304 Mass. 130, 134;
State v. *Loy*, 299 N. W. 908 (Sup. Ct. of North Dakota, 1941);
Thygerson v. *Whitbeck*, 5 Utah 406; 16 P. 403;
Zip Mfg. Co. v. *Peh Mfg. Co.*, 44 F. (2d) 184 (D. C. of Del.).

This is a matter of far reaching importance, in view of the fact that a great many controversies between employers and employees doing an interstate business, are constantly being arbitrated.

On this ground alone this Court should grant a writ of certiorari.

CONCLUSION.

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

HERBERT GOLDMARK,
JOSEPH K. GUERIN,
Counsel for Petitioner.

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CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of Todd Erie Basin Dry Docks, Inc., and on behalf of himself and other employees and former employees of Todd Shipyards Corporation, similarly situated,

Petitioner,

against

TODD SHIPYARDS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULES HABERMAN,
ROBERT B. LISLE,
Counsel for TODD SHIPYARDS CORPORATION, *Respondent.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of Todd Erie Basin Dry Docks, Inc., and on behalf of himself and other employees and former employees of Todd Shipyards Corporation, similarly situated,

Petitioner,

against

TODD SHIPYARDS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is reported in 59 F. Supp. 779 (50-55).*

The Circuit Court of Appeals unanimously affirmed upon the opinion below (63).

Jurisdiction

The order for mandate was filed October 31, 1945 (64). The judgment on the mandate was rendered on November 29, 1945.

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* All references are to pages of the record.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 347).

Questions Presented by Petitioner

The petition presents only one question: Does the complaint state a cause of action under the Fair Labor Standards Act of 1938?

The question presented by the petitioner, as to whether a claim under the Fair Labor Standards Act is subject to arbitration, is not before this Court, because it was not passed on below. Having granted respondent's first motion to dismiss the complaint for lack of subject-matter jurisdiction upon the ground that no claim under the Act was alleged, the District Court held that it was unnecessary to pass on the alternative motion for summary judgment dismissing the complaint based upon the arbitrators' award disallowing the claim (55, 56).

The Circuit Court of Appeals adopted the opinion below (63).

Preliminary Statement

Petitioner seeks a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit, rendered November 29, 1945, unanimously affirming the judgment of the United States District Court for the Southern District of New York (Coxe, J.), entered March 7, 1945, which dismissed the complaint upon the ground that the court lacked jurisdiction over the subject matter of the action (56-57).

Petitioner seeks premiums provided by a labor agreement between the respondent and petitioner's union, for alleged continuous work without an opportunity for supper.

Petitioner concedes, as he must, that the Act contains no provision for the payment of the premiums demanded in this action. He is asking this Court to add a provision to the Act for the payment of the premiums found only in the labor agreement, upon the plea that such judicial legislation would be "humanitarian".

Since the relief sought is based upon a specific labor agreement, the question whether the petitioner is entitled to the premiums provided by the labor agreement is of interest only to the parties to this action and is not of general public concern. Petitioner has invoked the Fair Labor Standards Act as a vehicle for bringing a class action in the federal court, which, he concedes, would otherwise be without jurisdiction (pet. pp. 3-4).

The length of a mealtime, the time of the day or night when it should be taken and the premiums to be paid in the event it is delayed are matters peculiarly within the realm of collective bargaining between the employer and the employee, depending upon the circumstances of each employment. Congress has wisely refrained from making such matters a part of the Fair Labor Standards Act, since no uniform provision could be applied to every type of employment. Surely it is not the function of the courts to add to the Act a mealtime schedule and a provision for premiums for which the parties have already provided in their labor agreement.

Petitioner's redress, if any, was under the labor agreement and not under the Act. The basic issues presented by the complaint have all been the subject of an arbitration between petitioner's union and the respondent pursuant to the provisions of their labor agreement. After a full hearing, the arbitrators rendered an award in favor of the respondent (43-45). They stated:

> "We are satisfied from the testimony, the minutes of the negotiations, the course of conduct of the parties and the realities of the employment situation, reflected in the testimony, that the parties did not intend that the premium provisions of Article XVII were to be applicable to the police guards." (44)

In an effort to evade the arbitrators' award, petitioner now asserts in this action that the alleged breach of the labor agreement constitutes a violation of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A., Sec. 201 et seq.), and then urges that a claim under the Act is not subject to arbitration.

Nature of Action

This action is brought by a former employee of respondent, Todd Shipyards Corporation, suing on his own behalf and on behalf of all other employees of the respondent similarly situated to recover sums of money, including liquidated damages and attorney's fees, alleged to be payable by the respondent (1) for breach of a labor agreement, (2) for alleged violation of the Federal Fair Labor Standards Act of 1938 and (3) for alleged violation of the Labor Law of the State of New York. Each of these claims is made the basis of a separate cause of action.

The first cause of action

A violation of the following provision of the labor agreement is alleged:

> "If an employee working on straight time or overtime is required to work continuously more than five hours without an opportunity for lunch or supper, as the case may be, he shall be entitled to receive a premium for all time worked beyond such five hours at the rate of one-half of his regular straight time base rate of pay, until he has an opportunity for lunch or supper, whereupon his right to such premium shall end, * * *." (29)

Petitioner alleges that he was required to work on stated dates continuously more than five hours without an opportunity for supper, and thereby became entitled to a premium for each of the hours worked on such days beyond five hours at the rate of one-half of his regular straight time base rate of pay, amounting to $807.30 (10). In addition to the amount sought by petitioner on his own behalf, he asks for the same relief for such of the former and present guards "as shall hereafter and up to and including the trial of this action appoint the plaintiff as their agent for the purpose of obtaining said relief" (11).

The second cause of action

Petitioner alleges that the labor agreement was made "in pursuance of the provisions of said Fair Labor Standards Act of 1938 and the provisions of said Fair Labor Standards Act, thereby became a part of said agreement, in that the purpose of said act was to eliminate labor conditions detrimental to the general welfare of workers and a requirement that employees should work for more than five hours continuously without an opportunity for lunch or supper, as the case might be, would be deemed dangerous to the health of said employees, and in violation of the purpose of said act" (12).

Petitioner then alleges that the violation of the labor agreement constituted a violation of the Act, entitling the affected employees to the premiums provided by the labor agreement, together with an additional equal amount as liquidated damages under the Act, besides a reasonable attorney's fee (12-13).

The third cause of action

Petitioner alleges that under the Labor Law of the State of New York, he and the other employees on whose behalf this action is brought were entitled to at least forty-five minutes for a meal period at a time midway between the beginning and end of their employment (14-15); that the labor agreement was made "in pursuance of the provisions of said Labor Law * * * and said provisions became a part of said agreement" (15); that petitioner and the other employees on whose behalf the action is brought were not given any such meal periods (16); and that petitioner and the other employees thereby became entitled to the premiums provided for in the agreen at (16).

Judgment is demanded for the sum of $1,614.60 with interest, plus premiums for the period between March 5, 1944 to May 18, 1944; for similar relief on behalf of such former and present employees similarly situated as shall hereafter appoint petitioner as their agent for the purpose of obtain-

ing relief; and for a reasonable attorney's fee as provided in the Act (17-18).

The Answer

The answer denies the material allegations of the complaint and contains eight separate defenses which may be grouped as follows:

1. That the Court lacks jurisdiction of the subject matter of the first and third causes of action (24).

2. That the second cause of action does not state a claim under the Fair Labor Standards Act (23).

3. That the labor agreement contained a provision for arbitration of such claims as petitioner asserts in this action; that an arbitration thereof was in fact had pursuant to the agreement and that an award was made determining the claims in favor of the respondent (21-23).

The motion to dismiss

Respondent moved for judgment pursuant to Rule 12 of the Rules of Civil Procedure dismissing the complaint upon the ground that the Court lacked jurisdiction of the subject matter of the action; that the sole basis for federal jurisdiction asserted in the complaint was the alleged violation of the Fair Labor Standards Act and the complaint did not state a claim under the Act upon which relief might be granted (40-41).*

The learned District Judge dismissing the complaint said:

> "1. The only possible basis of jurisdiction for the first and third causes of action is Section 24 (1) of the Judicial Code (28 U. S. C. A. §41 (1)) which confers original jurisdiction on the district court 'where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * (b) is between citizens of different States * * *'. In neither the first nor the third cause of action is there any allegation of diverse citizenship, and counsel for the plaintiff has conceded in his brief that 'if

* Petitioner concedes that "no diversity of citizenship is alleged in the amended complaint, * * *" (pet. p. 3).

it were not for the second cause of action, predicated upon a violation of the Fair Labor Standards Act, this court would be without jurisdiction over the first and third causes of action'. It is the contention of the plaintiff that jurisdiction over the second cause of action is sufficient to hold both of the two other causes of action under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238.

2. It is well settled that the district court has jurisdiction under Section 24 (8) of the Judicial Code (28 U. S. C. A. §41 (8) of an action brought under Section 16 (b) of the Fair Labor Standards Act (29 U. S. C. A. §216 (b)) irrespective of diverse citizenship or the amount involved. *Williams* v. *Terminal Co.* 315 U. S. 386. But does the second cause of action 'really and substantially involve a controversy' under the Fair Labor Standards Act? (See *The Fair* v. *Kohler Die & S. Co.* 228 U. S. 22, 25). I think not. Stripped of unnecessary verbiage, the allegations amount to nothing more than that the plaintiff was required to work over five hours on stated dates without an opportunity for supper, and that this entitled the plaintiff to the premium called for by the labor agreement. Surely, these allegations do not state a claim for unpaid minimum wages or unpaid overtime compensation under Section 16 (b) of the Fair Labor Standards Act. Moreover, it appears affirmatively from the complaint that the plaintiff has no claim whatever against the defendant for unpaid minimum wages or unpaid overtime compensation. The allegations charging violation of the Fair Labor Standards Act are 'plainly wanting in substance' (*Hurn* v. *Oursler, supra,* p. 246), and there is no possible basis even for invoking the *Hurn* v. *Oursler* doctrine. *Hurn* v. *Oursler* (*supra*); *Armstrong Co.* v. *Nu-Enamel Corp.* 305 U. S. 315.

The motion of the defendant to dismiss the amended complaint for lack of jurisdiction is granted. With this disposition, it will be unnecessary to pass on the other parts of the motion." (54-55)*

The Circuit Court of Appeals unanimously affirmed on the opinion below (63).

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* Reference is here made to the alternative motion for summary judgment based upon the arbitrators' award.

The reasons relied on by the petitioner for the allowance of the writ are insufficient

(1) The question whether employees of the respondent are entitled to the premiums provided by the labor agreement has no bearing upon the administration of the Fair Labor Standards Act, because the Act contains no provision for the payment of such premiums and no violation of the Act is alleged in the complaint.

(2) There is nothing in the preamble to the Act which supports petitioner's demand that a provision be added by the Court for the payment of premiums found only in the labor agreement.

(3) Petitioner can find no support for his views in the title of the Act, which is commonly referred to as the "Wages and Hours Law".

(4) There is no occasion for the taking of any evidence, as suggested by the petitioner, because he has failed to state a cause of action under the Act upon which relief may be granted. His complaint remains insufficient, even if he were able to sustain every allegation.

(5) The question whether a claim under the Act is subject to arbitration is not before the Court. As has already been stated, the Courts below did not consider it necessary to pass upon the motion based upon the arbitrators' award, having granted the motion to dismiss the complaint for lack of jurisdiction.

I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE FAIR LABOR STANDARDS ACT.

Petitioner concedes that "the second cause of action alleging a violation of the Fair Labor Standards Act, furnished the only basis for jurisdiction by the District Court" (pet. 3-4).

We therefore consider the second cause of action to determine whether any basis exists for federal jurisdiction.

The theory of this cause of action is set forth in paragraph TWENTY-SECOND as follows:

> "TWENTY-SECOND: That the agreement referred to in the paragraphs of this complaint, numbered 'Eleventh' and 'Twelfth' hereof, was made as therein set forth, in pursuance of the provisions of said Fair Labor Standards Act of 1938 and the provisions of said Fair Labor Standards Act, thereby became a part of said agreement, in that the purpose of said act was to eliminate labor conditions detrimental to the general welfare of workers and a requirement that employees should work for more than five hours continuously without an opportunity for lunch or supper, as the case might be, would be deemed dangerous to the health of said employees, and in violation of the purpose of said act; therefore, as compensation for said physical and mental strain on said employees who should be compelled to work more than five hours continuously without an opportunity for lunch or supper, a premium was granted to said employees, respectively, for all time worked beyond said five hours at the rate of one-half of the regular straight time base rate of pay." (12)

It is then alleged that petitioner was required to work more than five hours without an opportunity for supper which was a violation of the Fair Labor Standards Act, by virtue of which he became entitled to the premium provided in the labor agreement in addition to liquidated damages and attorney's fees under Section 16(b) of the Act.

Section 6* of the Act requires every employer to pay each employee engaged in interstate commerce wages at the prescribed rates per hour.

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* "Section 6. Minimum wages.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) During the first year from the effective date of this section, not less than twenty-five cents per hour,

(2) during the next six years from such date, not less than thirty cents an hour,

(3) after the expiration of seven years from such date, not less than forty cents an hour * * *."

Section 7* of the Act requires every employer to pay compensation at a rate not less than one and one-half times the regular rate at which the employee is employed for employment in excess of forty hours a week.

Section 16 of the Act provides:

> "(b) Any employer who violates the provisions of Section 6 or Section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *."

Petitioner is asking this Court to add a provision to the Act that an employee who has worked continuously more than five hours without an opportunity for lunch or supper shall receive a premium for all time worked in excess of five hours at the rate of one-half of his regular base rate of pay until he has had an opportunity for lunch or supper.

He bases his request upon the plea that such a provision would be humanitarian and within the purposes of the Act as set forth in the preamble.

The preamble to the Act may be read to interpret its provisions, but it may not be used to create provisions which Congress did not see fit to include in the Act.

The answer to petitioner's argument is that the Act contains no provision for the payment of the premiums which he seeks in this action.

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* "Section 7. Maximum hours.

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * *

* * *

(3) For a work week longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

* * *"

We search in vain for an allegation in the complaint that the respondent has failed to pay the minimum wages required by Section 6, or the overtime compensation required by Section 7 of the Act.* All we find is a general reference that the "purpose of said Act was to eliminate labor conditions detrimental to the general welfare of workers" (12). The declaration of policy which petitioner has inaccurately paraphrased is contained in Section 2(a) which states that Congress has found the existence "of labor conditions detrimental to the maintenance of the *minimum* standard of living necessary for health, efficiency, and general well-being of workers."

In *McLeod* v. *Threlkeld,* 319 U. S. 491, 493, this Court said:

> "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority."

The process by which petitioner seeks to make out a claim under the Act is illogical and not in accord with the intent of Congress as expressed in the Act itself.

Assuming that the minimum wage and maximum hour requirements of the Act become a part of every contract of hire of employees covered by the Act, it by no means follows, as petitioner urges, that the "humanitarian" provisions of a labor agreement become a part of the Act. Thus petitioner endeavors to invoke the sanctions of the Act to enforce the provisions of a labor agreement which are not coincident with the requirements of the Act and which either go far beyond or are aside from its scope and purposes.

Petitioner would impute to Congress an intention that the rigorous remedies created by the Act be available to enforce the obligations of employers voluntarily assumed as well as those imposed by law. Yet Section 16(b) under

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* In fact petitioner alleges that he has been paid at the rate of ninety-two cents per hour (10). The minimum rate under the Act is forty cents per hour.

which petitioner brings his action is limited specifically and exclusively to violations of Sections 6 and 7 of the Act.

Thus petitioner's effort to bring the alleged breach of the labor agreement within the provisions of the Act for the purpose of bringing a class action in the federal court is defeated by the very provisions of Section 16(b) under which he purports to sue.

If Section 16(b) may be invoked to enforce performance of the provisions of a labor agreement which are not coincident with the Act, it would follow that the criminal penalties provided in Section 16(a) might also be invoked to enforce such provisions.*

Section 16 read with Section 15, which lists in detail the conduct prohibited by this statute,** negates by clear implication any intent by Congress to make the rigorous remedies of the Act available to enforce the obligations of an employer to its employees other than those imposed by the Act itself.

There is nothing in the Act which even remotely suggests the offense with which the respondent is charged in this complaint, nor is there any provision for a recovery of damages for such an offense. The only place we find any provision for the payment of the premium demanded in the complaint is in the labor agreement to which alone petitioner must look for redress.

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* Section 16(a) imposes a fine of not more than $10,000 or to imprisonment of not more than six months or both for wilful violation of the provisions of Section 15.

** Section 15 prohibits:

(1) Shipment of goods manufactured in violation of Sections 6 or 7 or of regulations or orders of the Administrator as to working conditions of learners, apprentices and handicapped workers.

(2) Violations of Sections 6 and 7.

(3) Discrimination against employees asserting rights under the Act.

(4) Violation of child labor provisions of the Act.

(5) Violation of record-keeping requirements of the Act.

In *United States* v. *Darby,* 312 U. S. 100, this Court, considering the constitutionality of the Act, refers to it again and again as being concerned only with the raising of basic wages and the reduction of hours. This Court said (pp. 109-110):

> "The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours *which fail to conform to standards set up by the Act.* Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3rd Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the *minimum* standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such *substandard* labor conditions among the workers of the several states." (italics supplied)

In considering the validity of the wage and hour provisions of the Act under the Fifth Amendment, this Court said (p. 125):

> "Both provisions are *minimum* wage requirements compelling the payment of a *minimum* standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed." (italics supplied)

Interpretative Bulletin No. 4, promulgated by the Administrator (CCH Labor Law Service, ¶ 32,104), deals

in part with problems arising in cases in which a labor agreement calls for payment of overtime or other specific compensation not required by the Act. It is implicit throughout this part of the Bulletin (see pars. 69-73) that the sanctions of the Act are properly invoked to enforce a labor agreement only to the extent that the obligations raised by the agreement coincide with the obligations imposed by the Act. These rulings and opinions are entitled to great weight (*Skidmore* v. *Swift & Co.*, 323 U. S. 134).

The inescapable conclusion from a study of the Act, the decisions of the courts, the rulings of the Administrator and the committee reports in Congress* is that the command of Congress does not extend to the maximum obligations of employers assumed by contract but relates only to the minimum requirements imposed by the Act.

Armour & Co. v. *Wantock*, 323 U. S. 126, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, and *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local*, 321 U. S. 590, cited by petitioner, all involved the question as to what constituted working time under the Act. There is no question of working time here, since petitioner makes no claim that he worked more than forty hours a week. Nevertheless, he invokes the overtime provisions of the Act to double the premiums provided by the labor agreement.

Petitioner's Argument

In a labored effort to spell out a violation of the Act, petitioner argues that the purpose of the Act is "remedial and humanitarian"; that although the Act does not provide for the payment of these premiums, failure to afford an opportunity for supper violates the "purpose" of the Act; therefore violation of the labor agreement constitutes a violation of the Act. He then applies the remedies afforded by the Act to the enforcement of the labor agreement, combining the provisions for the payment of pre-

* H. R. 1452, 75th Cong., 1st Sess., H. R. 2182, 75th Cong., 3rd Sess., S. R. 884, 75th Cong., 1st Sess.

miums found only in the labor agreement with the provisions for liquidated damages and counsel fees found only in the Act. By means of this process of hopping from the labor agreement to the Act and back again, petitioner concludes that he has alleged a violation of the Act upon which he invokes federal jurisdiction.

Petitioner's argument is answered by the fact that no provision of the Act has been violated. The Act provides only for maximum hours and minimum wages. There is nothing in the Act which even suggests the obligation of the employer to pay the premiums for which petitioner sues.

In fact, there is nothing in the labor agreement which obligated the respondent to pay these premiums to the police guards on whose behalf petitioner purports to sue. The arbitrators, who had the power and authority to pass upon disputes arising out of any provision of the labor agreement or the "construction or application thereof", so determined (44).

Petitioner's theory that the violation of a provision of a labor agreement which is "humanitarian in nature" constitutes a violation of the Act, would lead to strange results.

The labor agreement contains, in addition to the clause on which the complaint is based, numerous provisions for various types of extra compensation unrelated to the basic rate of pay and not coincident with the overtime requirements of the Act. These include (27-30):

> 1. Time and one-half for work in excess of eight hours in any work day (Article XVI, Subdivision 2(a)).
>
> 2. Time and one-half for hours worked outside the employee's regular shift (Article XVI, Subdivision 2(c)).
>
> 3. Time and one-half for hours worked on Saturday except regular shift work begun Friday night (Article XVI, Subdivision 2(d)).
>
> 4. Double time for hours worked on Sunday except regular shift work begun on Saturday (Article XVI, Subdivision 3(a)).

5. Double time for work on any of eleven designated holidays except regular shift work begun preceding night (Article XVI, Subdivision 3(d)).

6. Time and one-half for work during 10-hour rest period between quitting time on one day and commencement of work on the next (Article XVI, Subdivision 4).

7. Time and one-half for work under unusually dirty conditions (Article XVIII, Subdivisions 1 and 2).

8. Time and one-half for work in closely confined spaces (Article XVIII, Subdivision 3).

The acceptance of the petitioner's argument would carry with it the implication that failure of the employer to fulfill the requirements of its labor agreement with regard to the types of extra compensation outlined above, would render the employer liable to an enforcement proceeding by the Administrator or to an employee's suit under Section 16(b) as well as to the criminal penalties under Section 16(a) of the Act.

Thus, for example, failure to pay double time for work on Sunday, an obligation voluntarily assumed by the employer going far beyond not only the requirements of the Act but also beyond generally prevailing policy with respect to premium pay (see Executive Order 9240),* would subject the employer, on the petitioner's theory, to liability not merely in the amount of the unpaid premium but in the equivalent amount of liquidated damages under the Act, as well as to a heavy fine and imprisonment.

The expressed policy of Congress to cure "labor conditions detrimental to the maintenance of the minimum standard of living" cannot be stretched to any such limits.

The acceptance of petitioner's theory would stifle labor relations. Employers would be discouraged from agreeing to employees' benefits not specifically covered by the Act, since a violation of any gratuitous benefit conferred in a

* CCH, Labor Law Service, ¶ 36,401.

labor agreement would subject the employer to liquidated damages and criminal penalties under the Act.

Petitioner's theory below of jurisdiction over the first and third causes of action

Although petitioner conceded that if it were not for the second cause of action, predicated upon a violation of the Fair Labor Standards Act, the District Court would be without jurisdiction over the first and third causes of action, he nevertheless contended below that the Court should retain jurisdiction over the other two causes of action even though no violation of the Act were alleged (pet. p. 4).

Although this contention is mentioned in the petition, it is not specifically brought forward by the petition for consideration by this Court nor mentioned in the brief (pet. pp. 4-5). Under these circumstances, we assume that the point has been abandoned and will not be considered by this Court (Rule 38, subd. 2, of the Rules of the Supreme Court; *Nat. Licorice Co.* v. *Labor Board,* 309 U. S. 350, 359).

II

THE QUESTION OF ARBITRATION IS NOT BEFORE THE COURT.

Petitioner urges that certiorari be granted on the ground that there is a conflict of decision as to whether a claim under the Act is subject to arbitration. That question is not before this Court. Having granted respondent's first motion to dismiss the complaint for lack of subject-matter jurisdiction, the learned District Judge expressly stated both in his opinion and in the judgment that it was unnecessary to pass on the alternative motion based upon the arbitrators' award (55, 56). The Circuit Court of Appeals affirmed on the opinion below (63).

This Court has consistently refused to grant certiorari for a question not litigated or passed upon below.

McCullough v. *Kammerer Corp.*, 323 U. S. 327, 328.

In that case this Court said in dismissing a writ inadvertently granted:

> "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. *Duignan* v. *United States*, 274 U. S. 195, 200; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *United States* v. *Classic*, 313 U. S. 299, 329. The grounds asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore
>
> *Dismissed.*"

Since the question of arbitration was not passed upon below, it is not properly here for review.

CONCLUSION

Petitioner has presented no basis for the granting of certiorari as required by the Rules of this Court. The question whether he has stated a cause of action under the Fair Labor Standards Act based upon the provisions of this particular labor agreement is of interest only to the parties to this agreement and not of general concern. The decision is not in conflict with any decision of any other court nor with the decisions of this Court construing the Act.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JULES HABERMAN,
ROBERT B. LISLE,
Counsel for TODD SHIPYARDS CORPORATION, *Respondent.*

January 31, 1946.